

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DEIRDRE M. BROOKS.

**Plaintiff,**

v.

CAROLYN W COLVIN, Acting  
Commissioner of the Social Security  
Administration.

Defendant.

CASE NO. 3:13-cv-05797 JRC

**ORDER GRANTING MOTION FOR  
ATTORNEY'S FEES PURSUANT  
TO 42 U.S.C. § 406(b)**

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States Magistrate Judge, Dkt. 6). This matter is before the Court on plaintiff's Motion for Attorney's Fees Pursuant to 42 U.S.C. § 406(b) (*see* Dkt. 28). The defendant agrees that the Court should award some fees, but requests that plaintiff's attorney be awarded a lesser amount (*see* Dkt. 29, p. 1). This matter has been fully briefed (*see* Dkt. 28, 29, 30, 31).

**ORDER GRANTING MOTION FOR  
ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §  
406(B) - 1**

1       Defendant's reasoning as to why plaintiff's attorney's fees should be reduced relies solely  
2 on her argument that the calculation of the past-due benefits is erroneous, which both parties  
3 agree that it is, at least with respect to use of this amount for determination of attorney's fees.  
4 Defendant contends that the amount should be reduced by two months, while plaintiff contends  
5 that it should be reduced by one month. The parties dispute the meaning of the phrase  
6 "determination or decision," as discussed in the relevant federal regulation, 20 C.F.R. §  
7 416.1503. According to this regulation, past-due benefits are the "total amount of payments . . .  
8 . that has accumulated to [a claimant] because of a favorable administrative or judicial  
9 determination or decision, up to but not including the month the determination or decision is  
10 made. *Id.*

11       The federal regulation is ambiguous because there actually are two relevant  
12 determinations or decisions: the decision that a claimant meets the medical requirements to  
13 receive Supplemental Security Income ("SSI"); and the determination of financial eligibility --  
14 both of which must be met before a claimant accumulates any payments. This issue is resolved  
15 herein by noting that in SSI only cases, Title XVI cases, there is not a final determination as to  
16 the allowance of benefits until the financial eligibility is determined, which occurs after the  
17 decision regarding disability. Therefore, although it is true that the past due benefits amount is  
18 off by one month, as acknowledged by plaintiff, it is not off by two months, as contended by  
19 defendant.

20       Therefore, the proper retroactive award for purposes of determination of attorney's fees is  
21 \$46,830.00 -- 25% of which is \$11,707.50. After subtracting the EAJA award of \$6,552.12,  
22 plaintiff should be awarded a net 406(b) attorney's fee award of \$5,155.38, as discussed further  
23 herein.

## STANDARD

The Court may allow a reasonable fee for an attorney who represented a Social Security claimant before the Court and obtained a favorable judgment, as long as such fee is not in excess of 25 percent of the total of past-due benefits. *See* 42 U.S.C. § 406(b)(1); *Grisbrecht v. Barnhart*, 535 U.S. 789 (2002). When a contingency agreement applies, the Court will look first to such agreement and will conduct an independent review to assure the reasonableness of the fee requested, taking into consideration the character of the representation and results achieved. *See Grisbrecht, supra*, 535 U.S. at 807, 808 (footnote omitted) (citations omitted). Although the fee agreement is the primary means for determining the fee, the Court will adjust the fee downward if substandard representation was provided, if the attorney caused excessive delay, or if a windfall would result from the requested fee. *See Crawford v. Astrue*, 586 F.3d 1142, 1151 (9th Cir. 2009) (citing *Grisbrecht, supra*, 535 U.S. at 808).

## DISCUSSION

14 Here, the representation was standard, at least, and the results achieved excellent (see  
15 Dkt. 28, Attachment 3). See *Grisbrecht, supra*, 535 U.S. at 808. Following stipulated remand  
16 from this Court and a second administrative hearing, an Administrative Law Judge awarded  
17 benefits to plaintiff (see *id.*, Attachments 2, 3). There has not been excessive delay and no  
18 windfall will result from the requested fee. The parties do not dispute these findings.

19 However, the parties disagree as to the amount that should be utilized when determining  
20 the amount of attorney's fees allowable. Generally, this is termed the past due benefits amount.  
21 However, the amount of past due benefits that should be utilized for purposes of determining the  
22 proper amount of attorney's fees is disputed, as both parties agree that the local Social Security  
23 Administration ("SSA") office included the month of July, 2016, where the relevant federal

1 regulation requires that the retroactive reward be determined through June, 2016, at the latest.  
 2 The parties disagree as to whether or not the amount of the award for June, 2016 should be  
 3 included.

4 Plaintiff originally requested a net attorney's fee of \$5,338.63, but amended this request  
 5 to a net award of \$5,155.38, after subtracting \$183.25, which represents 25% of the \$733.00 that  
 6 was awarded to plaintiff for the month of July, 2016 (Dkt. 28, p. 1; Dkt. 31, p. 6). Defendant  
 7 contends that plaintiff's award for attorney's fees, while warranted, should be reduced and that  
 8 plaintiff should be awarded \$4,972.13, which would reflect a reduction of a further \$183.25,  
 9 representing 25% of the \$733 that was awarded for the month of June, 2016 (Dkt. 29, pp. 1-4).

10 Defendant's argument is based on defendant's interpretation of 20 C.F.R. § 416.1503,  
 11 which indicates, in part, that past-due benefits are:

12 the total amount of payment under Title XVI of the Act, the Supplemental  
 13 Security Income (SSI) program, including any Federally administered State  
 14 payments, that has accumulated to you and your spouse because of a favorable  
 administrative or judicial determination or decision, up to but not including the  
 month the determination or decision is made.

15 20 C.F.R. § 416.1503.

16 Plaintiff contends that defendant has misunderstood the difference between Title II and  
 17 Title XVI (Dkt. 31, p. 2). Plaintiff contends that although it is true, as noted by defendant, "that  
 18 '[o]n June 23, 2016, [the Administration] made our decision . . . . that [plaintiff met] the  
 19 medical requirements to receive SSI," (Dkt. 29, p. 3 (citing Dkt. 28-3, p. 1)), it was not until  
 20 July, 2016, that "SSA's financial eligibility determination was issued . . . ." (Dkt. 31, pp. 2-3).  
 21 Plaintiff contends that if this case was "a Title II case based on plaintiff's earnings, then the  
 22 Commissioner would be correct in arguing that June and July should be excluded from the total  
 23 of the past-due benefits" (*id.*, p. 3). However, plaintiff contends that in this case, where the ALJ  
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1 “issues an ‘SSI only’ decision, that decision is not the relevant ‘decision or determination’ that  
 2 marks the time period for determining past-due benefits” (*id.*). Plaintiff argues that “[t]his is  
 3 because when an ALJ makes a decision on an ‘SSI only’ case, the ALJ decides only if the  
 4 claimant is ‘disabled’ [and] [t]he ALJ does not make a determination of financial eligibility”  
 5 (*id.*). As noted by plaintiff, the determination regarding “financial eligibility is made by the local  
 6 SSA office --- after the ALJ issues his or her ‘disability’ decision” (*id.*). Plaintiff contends that it  
 7 is this determination of financial eligibility that is the “determination or decision” referenced in  
 8 20 C.F.R. § 416.1503, which, in this case, “is the July 20, 2016, Notice of Award determination  
 9 made by the local SSA office after considering the claimant’s income and resources during the  
 10 period covered by the ALJ’s ‘disability’ decision” (*id.*). Plaintiff’s argument is persuasive.

11       Although defendant contends that the Administration’s interpretation of the meaning of  
 12 the past-due benefits, as set forth in the relevant regulation, 20 C.F.R. § 416.1503, is entitled to  
 13 *Chevron* deference, this regulation is ambiguous regarding which “determination or decision” is  
 14 the one that should be utilized when determining past-due benefits (Dkt. 29, p. 2 (citing *Chevron*  
 15 *U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984))). There are two  
 16 relevant determinations or decisions: first, there is the decision that plaintiff met “the medical  
 17 requirements to receive SSI,” as noted by defendant (Dkt. 29, p. 3 (citing Dkt. 28-3, p. 1)).  
 18 However, before plaintiff is entitled to receive any benefits, as noted by plaintiff, there remains  
 19 the determination of financial eligibility, which is made by the local SSA office, which was  
 20 made in this case in July, 2016 (Dkt. 31, p. 3).

21       Based on the explicit text of the relevant regulation, the Court concludes that the relevant  
 22 “determination or decision” in an “SSI only” Title II case is the final determination of financial  
 23 eligibility. The relevant federal regulation indicates explicitly that past-due benefits are the  
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1 amount of payments “that has *accumulated* . . . because of a favorable administrative or  
 2 judicial determination or decision . . . .” 20 C.F.R. § 416.1503 (emphasis added). When the  
 3 ALJ makes a determination regarding whether or not a claimant has met the medical  
 4 requirements, no amount of payments “has accumulated.” *Id.* That is because if the subsequent  
 5 determination of whether or not the claimant meets the financial eligibility is not favorable to a  
 6 claimant, such claimant will not receive any payments. Therefore, no amount of payments  
 7 accumulates until the second determination regarding financial eligibility is made.

8       This conclusion is buttressed by the Program Operating Manual System (“POMS”),  
 9 although the Court notes that the POMS does not impose judicially enforceable duties against the  
 10 Administration, as correctly noted by defendant (Dkt. 29, pp. 2-3 (citing *Lowry v. Barhnart*, 329  
 11 F.3d 1019, 1023 (9th Cir. 2003) (citation omitted))). As noted by plaintiff, although the POMS  
 12 conflicts with the relevant federal regulation in part, the POMS separately indicates that past-due  
 13 benefits are the amount of payments that accrues “through the month of effectuation,” where the  
 14 month of effectuation is “the calendar month SSA certifies that all evidence necessary to begin  
 15 payment is present,” that is, the month during which the financial eligibility determination by the  
 16 local SSA office is made (Dkt. 31, pp. 4-5 (citing POMS,  
 17 <https://secure.ssa.gov/poms.nsf/lnx/0203940007>, last visited September 29, 2016)); *see also* GN  
 18 03920.030D, available at <https://secure.ssa.gov/poms.nsf/lnx/0203920030#d>, last visited  
 19 September 29, 2016).

20       Plaintiff concedes that the original request for attorney’s fees was off by one month (Dkt.  
 21 31, p. 6). Plaintiff requests a gross award of \$11,707.50, from which should be subtracted the  
 22 EAJA award of \$6,550.12, thus resulting in a requested net award of \$5,155.38 (*id.*).  
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1 Plaintiff's total back payment was noted to be \$47,563.00 (*see* Dkt. 28, Attachment 3, p.  
2 2), however after deduction of \$733 for the one month (July), the correct retroactive award for  
3 determination of fees is \$46,830.00. Twenty-five percent of this is \$11,707.50. Plaintiff has  
4 moved for a net attorney's fee of \$5,155.38 (*see* Motion, Dkt. 28, p. 1; Reply Supplement, Dkt.  
5 31, p. 6), and the Court has considered plaintiff's gross attorney's fee of \$11,707.50; and the  
6 EAJA award received by plaintiff's attorney in the amount of \$6,552.12; *Parish v. Comm'r. Soc.*  
7 *Sec. Admin.*, 698 F.3d 1215, 1221 (9th Cir. 2012).

8 **CONCLUSION**

9 Based on the above, it is hereby ORDERED that attorney's fees in the amount of  
10 \$5,155.38 be awarded to plaintiff's attorney pursuant to 42 U.S.C. § 406(b), minus any  
11 applicable processing fees as allowed by statute. After plaintiff's attorney's fees have been  
12 awarded, any remaining funds held by the Social Security Administration should be released  
13 directly to plaintiff.

14 Dated this 30th day of September, 2016.

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17 J. Richard Creatura  
18 United States Magistrate Judge  
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